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BY THE SENATE,

FEBRUARY 16, 1858.

Read and ordered to be printed.

By order,

C. HARWOOD, Secretary.

INTERNAL IMPROVEMENTS ON THE
EASTERN SHORE.

R E P O R T

OF THE

M I N O R I T Y

OF THE

COMMITTEE ON JUDICIAL PROCEEDINGS.

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INTERNAL IMPROVEMENTS

ON THE

EASTERN SHORE.

Mr. BROOKE, from the minority of the committee on Judicial Proceedings, of the Senate, submitted the following report :

The undersigned, respectfully asks the privilege in the form of a minority report, to explain the grounds on which he dissents from the conclusion arrived at by the majority of the committee on Judicial Proceedings, to which was referred the bill entitled, "An Act applying to works of Internal improvement on the Eastern Shore, certain portions of the unexpended balance of the million dollars," which by the act of eighteen hundred and thirty-five, chap. 395, entitled, &c.

Recognizing in the broadest sense, the obligation resting on the State faithfully to fulfil *all* its contracts, and, also, an equality of rights among the citizens of every portion of its territory. It would be idle to attempt to add force to this unqualified recognition by the mere accumulation of words.

It is sufficient to say, (what is *honest* and *constitutional*,) is that which can never fail to address itself with impressive, if not controlling influence, to the judgments of the representatives of the people of Maryland, (who, true to the instincts and principles of their constituencies,) have never been sluggish in the fulfilment of every engagement. This is the just pride and warranted boast of every Marylander. It is his birth-right—and, as an accompaniment to it, it may be added, with the true Marylander, there is nothing known of the distinction of "*Shores*," save what each man feels as dwelling by his own hearth-stone, or by the magnificent Bay, which, by the finger of the Almighty, was directed to rest

as a perfect type of the good-will and love which *should exist* between all those, whether from the Eastern or Western Shore, who are permitted to look upon it. *It is a partition without a division.*

Without circumlocution, the bill recommended by the majority of the committee, may be defined to be one designed to take from the Treasury of the State, (and of course from the people,) the large sum of eight hundred and forty-seven thousand two hundred and thirty-five dollars and eighty cents. I will not stop to fatigue the Senate with a specification of the details by which this result is proposed to be accomplished. Whether it is proposed to be done by the endorsement of bonds by the State, the issue directly by it of bonds, or, the payment of money to be acquired by taxation or loan, is wholly immaterial to the inquiry. The substance of the recommendation of the committee, is to *appropriate* of the means of the people of Maryland, so much of their money. This, so far as I know, and believe, is the avowed, as it is the purpose of the bill. The question then arises, whether the Legislature of Maryland has the power to do it? It is a question which can only be answered by the constitution and laws, to whose supreme control we are subjugated, whilst acting in our Legislative capacity. The majority of the committee entertain the opinion it can be done in conformity to both, nay more, they hold it to be the incumbent duty of the State to redeem a plighted faith, which, as they substantially allege has to this time been disregarded. So far as I have heard, the belief of the majority is derived entirely from their interpretation of the act of 1835, chapter 395, generally known as the "Eight Million Bill." They believe, (as I am bound to suppose) that, that act gave by way of grant *unconditionally* one million of dollars to the "Eastern Shore."

The 8th section of that act expressly provides, by way of proviso, that no instalment *shall be paid by him* (the Treasurer) *until after an equal proportional payment shall have been actually made by the other stockholders."*

The right interpretation of this language depends wholly on the ascertainment of a *fact*, which is—was there an equal proportional *payment* by the stockholders, other than the State? If there was such payment on the part of the other stockholders, the Governor and Treasurer of the State can certify the fact. They are both required to do so by the act of 1835. They have not done so, and it is not pretended that any such payment was ever "ACTUALLY made."

It must be observed, that, according to the words I have quoted, the obligation of the State does not arise until "*after* the other stockholders shall have made" proportional pay-

ments. It does not rest on a concurrence of action, nor on anything done by the State *before* the right to the other parties accrued. It is what the law knows as a condition *precedent*. That I am warranted in saying so, I will invoke the aid of some of the masters of the law.

In Bacon's Abridgement, (Bouvier's edition) second volume, title condition, letter I. it is said :

"Conditions precedent are such *as must be performed before the estate can vest*," but on a condition subsequent, the estate is immediately executed, yet the continuance of such estate dependeth on the breach or performance of the condition." Chancellor Kent, in the fourth volume of his commentaries, page 129, uses this language :

"A precedent condition is one which *must take place before the estate can vest or be enlarged* ; as if a lease to B for a year, to commence from the first day of May thereafter upon condition that B pay a certain sum of money within the time ; or, if an estate for life be limited to A upon his marriage with B, here the payment of the money in the one case, and the marriage in the other are precedent conditions, and *until the condition be performed the estate cannot be claimed, or vest*." These authorities, it seems to me, are sufficient to satisfy the mind of any lawyer ; but if any in addition be desired, I beg leave to refer Senators to the opinion of the highest judicial tribunal in our own State which is in strict conformity with the references I have given.

In the case of Collins, administrator of Carman vs. Carman's executor, reported in 5th Maryland, 504, the Court of Appeals lays down this broad doctrine, "When the law directs an act to be done, or a condition to be performed for the purpose of conferring a right, that right cannot be acquired if the act is left undone, or the condition is unperformed." Now, if these authorities be applied with special reference to the subject which the Legislature is now called upon to act ; how stands the matter ? Bacon, Kent, and other lawyers who have given us the benefit of their knowledge in a form which can be reached, tell us, as "*the payment of the money*" by those for whose advantage this bill is, must precede, the vesting of the title, or, to use the language of Chancellor Kent "*the estate cannot be claimed*." As I have said no one pretends the money was paid by the "Eastern shore Railroad" and therefore it follows as an irresistible conclusion both of law and of fact, that no faith has been violated and none plighted except on a condition which has not been performed.

But, it is said, there is a redeeming clause in the act of 1835, which relieves this case from the principles indicated,

and it is sought for in the words of the 8th section, which read: "The million of dollars shall set apart for, and intended to be applied to the said work, shall be held sacred, and the faith of the state is hereby pledged, that the said million of dollars shall be applied to the exclusive purpose of Internal Improvements on the Eastern shore, and for no other purpose whatsoever, and shall be subject to the disposition of any future legislation for this purpose, after the time shall have expired, for commencing the work, as proposed in the charter of the Eastern shore Railroad Company." In a generous spirit of candor, I avoid all mere verbal criticism on this clause, as understood by the majority, and content myself by simply alledging, that to my mind the dispensation granted by it, is only to the contingency, that if the time shall have expired for *commencing* the work as proposed in the charter for the Eastern shore Railroad Company "then nevertheless, the benefit of the million of dollars is due to those entitled to it. Now the historical fact is, the Eastern Shore Railroad had *commenced*, before the passage of the act of 1835, but, as its authorized managers thought it *possible* (the commencement, according to the requirements of the charter of the Eastern Shore Railroad Company,) might not be such a commencement, as the Governor and Treasurer would regard, the clause in the act, was put in as lawyers say—from the abundant caution. But, be all this as it may, the act of 1839, chapter 323, liquidated by payments, from the Treasury of the State, the debts of the Eastern Shore Railroad Company, and whilst that act reserves all rights guaranteed under the act of 1835, it does not assume to dispose of a question of vesture of rights, but leaves that question to the decision of the appointed Judicial tribunals of the land.

I suggested an amendment to the bill which will bring forth this judgment, and hoped the Senate would adopt it. They have seen fit to reject it. I now add for support to the views which I have here put together this remark, (and of the soundness of its law I have no doubt:—) The Eastern Shore like the Western Shore are but integral portions of the State, constituted of an aggregation of counties and the sovereign power over them is just the same, neither more or less, than that which it rightfully exercises over a single county, whether it be Allegany or Worcester. That this power exists, is plain, not only from the reason of the thing, but from the judgment of the highest tribunals of the country. The same bill under which this claim is preferred, gave to Washington county one million of dollars, (and, be it observed, the faith of the State was as strongly pledged to it as to the Eastern

Shore) in the event that the Baltimore and Ohio Railroad did not pass through it. The Legislature remitted the penalty and the constitutionality of the law came into question, and by the *unanimous* decision of the Court of Appeals, and also, the *unanimous* decision of the Supreme Court of the United States, it was determined that Washington county had no constitutional or legal right to demand the penalty.

I regard the act of 1839, as one recognizing the insolvency of the Eastern Shore Railroad Company, the State (dealing with it as with other bankrupts) made, in an indulgent spirit, the best composition for its creditors. That act was a *bounty*, now, it is invoked as a *contract*.

These being my views, I oppose the passage of the bill as recommended by a majority of the committee, but, if it is to pass, let it be passed with the amendment which I have suggested, and which I desire to be considered a part of this minority report, and I shall repose for the justification of my opposition, (not in an illiberal feeling to any part of the State,) nor in an unwillingness to fulfil, to the strictest letter, every engagement of the State. But on the 22d section of the 3rd article of the constitution, which is in these words: "The credit of the State shall not *in any manner*, be given or loaned to or in aid of any individual, association or corporation, nor shall the General Assembly have the power in any mode, to involve the State in the construction of works of Internal Improvement, or in any enterprize which shall involve the faith or credit of the State, or make any appropriations therefor ;"

I hold the bill to be a violation of that article, for, to recapitulate the reasons—Ist. There never was a grant or promise save on *condition*, which has not been performed: 2d. That if there ever was a performance, the grant lapsed or fell into the sovereignty, like a lapsed legacy, because of the bankruptcy of the company; and 3d. Because of the constitutional inhibition;

Respectfully submitted,

JNO. B. BROOKE,

Of the Committee on Judicial Proceedings.

I fully concur in the above views,

JNO. E. SMITH.

The bill referred to in the above report, being under consideration—

Mr. Brooke submitted the following:

Add after third and last section,

"And whereas doubts exists as to the constitutional power of the Legislature of this State, to enact into law the foregoing provisions ; therefore, that said question may be fully

tested, tried, and finally settled; it is hereby further provided, that before any bond shall be issued in the name of this State, or money paid by it, or in any manner appropriated for internal improvements, through any of its officers, as provided by the said foregoing section, or any of them, of this bill, it shall be incumbent on the Maryland and Delaware Railroad Company to sue out or cause to be sued out of the Circuit Court for Anne Arundel county, a writ of mandamus, directed to the Comptroller of this State, to show cause why he refuses to comply with the said foregoing provisions of this act; and it is further provided and enacted, that it shall be his duty to refuse to comply with the same, until he shall be directed to do so by the judgment of the Court; and if such judgment be awarded to the right of the Maryland and Delaware Railroad Company: then, and in that case, this act shall be deemed and taken, and every feature thereof, as of no effect, but as null and void, otherwise to be in full force and effect.

Sec. 4. And be it further enacted, That a right of appeal from the decision of the Circuit Court, herein authorized to be made, be and the same is hereby granted.

Which was read.



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